different opinions, it is mandatory on the trial Judge to do two things :—

(1) he shall give judgment accordingly — section 198 (i). That is, where he agrees with the opinion of both Assessors, or with the opinion of one Assessor where the Assessors are of different opinions, the trial Judge must himself, following the opinion of both Assessors or the opinion of one Assessor, as the case may be, convict or acquit the accused.

(2) Sentence the accused where his judgment is one of conviction — section 199.

In this appeal the requirements of section 198 (i) have not been complied with because the record does not show that the learned trial Judge gave any judgment. Nor does it fulfil the requirement laid down by this Court in the case of *Ng Peng Choon v. Public Prosecutor*[1], that the record must show that there was positive agreement between the trial Judge and both Assessors or one Assessor. The record in this appeal merely shows that the trial Judge passed sentence of death following the opinion given by both Assessors that the accused was guilty of murder. The actual note on the record of the opinion of the Assessors is :—

> "Assessors without retiring both find accused guilty of murder".

and no where on the record does it appear that the Judge agreed with the Assessors or that he convicted the accused.

It is no doubt possible, even probable, that if the learned trial Judge had complied with the provisions of the Criminal Procedure Code just mentioned, he would have reached the same opinion as the Assessors and have given judgment accordingly. That, however, is a matter of conjecture.

The omission to comply with those mandatory provisions of the Code is not a mere irregularity which can be cured by recourse to section 422 of the Code.

Following the decision of the Privy Council in the case of *Joseph v. The King*[2], where a somewhat similar set of circumstances arose and the conviction therein quashed, we allow this appeal and quash the conviction and sentence.

We order a new trial and pending that new trial the appellant is remanded in custody.

Appeal Allowed. New Trial Ordered.

SATHASIVAM AND 2 OTHERS v. PUBLIC PROSECUTOR

[App. Crim. Juris. (Storr, J.) August 3, 1948]
[Ipoh — Criminal Appeal No. 50 of 1948]

Penal Code Ss. 34 and 381 — Theft as servants — Accomplice — Meaning of accomplice.

In this case the first and second appellants were convicted of theft as servants of ceiling fans and the third appellant was convicted of assisting in the disposal of the fans. At the trial, one Manikam was called as prosecution witness and he gave evidence that the two appellants had discussed plans for the removal of the fans from the store where they were kept with him. Manikam reported the plot to a Police Inspector who told him to "carry on" and he would arrange to have the wrongdoers brought to book. On appeal it was argued **inter alia** (1) that the witness Manikam was an accomplice and his evidence should not have been accepted without corroboration; (2) that there was no evidence that the first appellant had removed the fans.

Held, (1) that a witness who has made himself an agent for the prosecution before the actual commission of the offence is not an accomplice; (2) that by virtue of Section 34 of the Penal Code the first appellant was liable for the act done by the second appellant in furtherance of their common intention; (3) that on the facts the only evidence against the third appellant was one of suspicion and he should not have been called on for his defence.

Cases referred to :—

(1) *Reg. v. Mullins* 3 Cox's Cases 526.

(2) *Karim Bakhsh v. Crown* I.L.R. 9 (Lahore) 550.

(3) *R. v. Bickley* 2 C.A.R. 53.

(4) *Reg. v. Dowling* 3 Cox's Criminal Cases 509.

(5) *Emperor v. Chatterbhug Sahu* 38 I.L.R. (Cal) 96.

CRIMINAL APPEAL FROM DISTRICT JUDGE.

M. N. Cumarasami for the 1st Appellant.

2nd Appellant in person.

M. S. Mahendran for 3rd Appellant.

M. G. Neal (Federal Counsel) for Respondent.

Storr, J. : — There are 3 Appellants in this case. I will deal firstly with the appeal of the 1st and 2nd Appellants.

The facts briefly were that the 2 Appellants were employed as Overseer and Checker, respectively, by D.C.R.E. at the Kamunting Hospital site. At that site was a store, the key of which was apparently under the control of the 2 Appellants. In that store were a number of ceiling fans, and on the afternoon of 9th March, 1948, certain of the fans, 10 it is alleged, were found to be missing. The 2 Appellants and another man, also employed at the site, named Hosey, were charged with the theft of the missing fans.

The evidence of the prosecution stated that on 29th February, 1948, the 2 Appellants, the man Hosey and one Manikam, also employed on the site, discussed plans for the removal of the fans from the store in lots of 10. At this meeting it was decided that the fans should be removed on the 7th March, 1948. Now Manikam, who had just been released from prison after serving a sentence for theft, stated

that on his release he had been told by Senior Inspector Pavee of Taiping that if ever he was in trouble to report to him. After the meeting Manikam apparently thought he was likely to be in trouble and so on the 5th March, 1948, reported the whole plot to Senior Inspector Pavee, who told him to "carry on" and he would arrange to have the wrongdoers brought to book. Manikam accordingly carried out his part in the plot to steal the fans and reported progress to Senior Inspector Pavee from time to time. On 6th March, 1948, it was decided to remove the fans on the following day and after a meeting at a coffee shop on 7th March 1948, all 4 went to the hospital site. The 1st Appellant gave instructions for the fans to be put into gunny sacks etc. Manikam and the man Hosey were let into the store by the 2nd Appellant with instructions to pack up the fans ready for taking away. During the time they were packing the fans they were locked in by the 2nd Appellant. After being let out of the store and waiting some time the 1st Appellant stated that the vehicle for taking away the fans had not turned up. In fact no vehicle turned up at all that day or the next day. It was finally decided that the fans should be removed during the lunch hour on the 9th March, 1948. At about 12.30 p.m. on that day the 1st Appellant told 2nd Appellant to bring a tipper to the store to remove the fans. This was done and the 2nd Appellant and the man Hosey loaded the fans into the tipper and away it went. During the whole of the time, from 5th March, 1948 to the time the fans were removed on 9th March, 1948 Manikam had reported to Senior Inspector Pavee or his agent. He now reported the removal to Senior Inspector Pavee's agent. The tipper was found to have gone to the Hokkien Cemetery, discharged its load and was seen returning by Senior Inspector Pavee with the 2nd Appellant and Hosey still in it. The fans, however, were never recovered. They were removed from the cemetery shortly after they had been delivered by an unknown person.

On the return to the site the 2nd Appellant and Hosey were arrested and a little later the 1st Appellant, who had just returned, was also arrested. All three were charged with the theft of the fans. The case against Hosey was withdrawn and he was duly acquitted and gave evidence for the prosecution. He was treated as an accomplice by the District Judge. Manikam was the main witness for the prosecution and was not treated as an accomplice by the District Judge. The 2 Appellants were convicted by the District Judge, Perak North, and were each sentenced to 6 months rigorous imprisonment and fined $500/- or 3 months rigorous imprisonment, sentences to be consecutive. They have appealed against these convictions and sentence.

Mr. Cumarasamy appeared on behalf of the 1st Appellant and the 2nd Appellant was in person. The first and main ground of appeal argued on behalf of the 1st Appellant was that the witness Manikam was an accomplice and his evidence should not have been accepted without corroboration. He submitted that the definition of an accomplice, as given in *Sarkar* on Evidence 7th Edition at page 1243 — "Accomplice is a person who concurred in the commission of an offence" covered the case of the witness Manikam. He referred to *Reg. v. Mullins*[1] and *Karim Bakhsh v. The Crown*[2].

The second ground of appeal was that there was no evidence that the 1st Appellant had committed the theft of the fans.

The third ground was that there was no evidence that any fans were stolen from the store or of their value.

The 2nd Appellant's case was, apart from the second ground of appeal, identical with the 1st Appellant's. He also submitted there were many discrepancies in the evidence, which really amounted to nothing.

For the Public Prosecutor, the respondent, Mr. Neal submitted on the first ground that the witness Manikam was *not* an accomplice and referred to:— *R. v. Bickley*[3], *Reg. v. Dowling*[4], *Emperor v. Chatturbhug Sahu*[5].

On the second ground he relied on Section 34 Penal Code, and on the third ground that there was ample evidence from which the District Judge could find that there were in fact fans stolen from the store and as to their number.

Now, the case mainly relied on by Mr. Cumarasamy was *Karim Bakhsh v. The Crown*[2], but that case is different to the present case in that there the witness held to be an accomplice had, at the time he reported to the police, *already committed* an offence. I think the correct interpretation of the law on the point raised in the first ground of appeal, after studying the authorities cited, is that if a witness has made himself an agent for the prosecution *before* the actual commission of that offence he is not an accomplice. I hold, therefore, in this case that the learned District Judge was correct in holding that the witness Manikam was not an accomplice.

The second ground raised by Mr. Cumarasamy is covered by Section 34 Penal Code which reads :—

> 34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

As to the third ground of appeal, I think there was sufficient evidence before the District Judge to find that the fans had been stolen from the store and that they were of same value.

With regard to the appeals of the 1st and 2nd Appellants against their convictions they will be dismissed.

As regards sentences I do not in any way consider the sentences excessive and the appeals against the sentences will also be dismissed.

Now the position of the 3rd Appellant, who was charged with "assisting in the disposal of the fans", Section 414 Penal Code, is entirely different. I have gone through the evidence of the prosecution on the record but I cannot find anything except perhaps suspicion against this Appellant, and I find that the learned District Judge has misdirected himself when he called upon the 3rd Appellant to enter upon his defence. His appeal will be allowed and the conviction and sentence quashed.

Appeal of First and Second Appellants Dismissed.
Appeal of Third Appellant Allowed.

THE MERCANTILE BANK OF INDIA (TRUSTEES) LTD. v. RUTH NICHOLAS.

[Orig. Civil Juris. (Bostock-Hill, J.) January 3, 1949]
[Penang — Civil Suit No. 129 of 1948]

Landlord and Tenant — Meaning of "Possession" — Possession by agent or licensee — Control of Rent Ordinance 1948 Ss. 2, 13 and 15(a).

The Plaintiffs in this case were the landlords of premises known as 7 Bangkok Lane, Penang. The Defendant is the sister of a Miss Sledge who became the tenant of the premises in 1941. In June 1947 Miss Sledge left for Borneo leaving the Defendant and her sisters living in the house. A Notice to Quit was duly served on Miss Sledge by registered post on the 25th May 1948. In this action the Plaintiffs claimed that the Defendant was a trespasser and asked for an injunction to restrain her from continuing to live on the said premises.

Held, that the tenant remained a statutory tenant, after the expiry of the Notice to Quit, as she was still "in possession" of the premises through her agent or licensee and that the defendant therefore was not a trespasser.

Cases referred to :—

(1) *Brown v. Draper* (1944) 1 K.B. 309.
(2) *Brown v. Brash and Ambrose* (1948) 2 K.B. 247.
(3) *Keeves v. Dean* (1924) 1 K.B. 685.
(4) *Skinner v. Geary* (1931) 2 K.B. 546.

CIVIL SUIT.

F. G. Pooley for the Plaintiffs.

Yeo Wee Pin for the Defendant.

Bostock Hill, J. : — The Plaintiffs in this case are the landlords of the house and premises known as No. 7, Bangkok Lane, Penang, and the Defendant is the sister of a Miss M. K. Sledge who became the tenant of the said premises in 1941.

The facts of the case are simple. Miss Sledge and the Defendant and two other sisters lived together in the said house from 1941 to 1947. The tenancy was arranged by Miss Sledge with the agent of the Plaintiffs and the rent receipts were given in the name of Miss Sledge though, apparently, the Defendant contributed towards the rent.

In about the middle of June, 1947, Miss Sledge left Penang for British North Borneo leaving the Defendant and her sisters still living in the house. Very soon after her arrival there Miss Sledge took up a post with a firm there and she has not been back since. Defendant continued to reside in the house and paid the rent in Miss Sledge's name i.e. the rent receipts continued to be given in Miss Sledge's name.

The Plaintiffs were not satisfied with this arrangement as they wanted the house and they attempted to serve Miss Sledge with a Notice to Quit in November, 1947, but it is not known that she ever received it. On 30th January, 1948 a Notice to Quit was handed to an adult inmate on the said premises and the Defendant stated that she heard of this but had not actually seen it. A third Notice to Quit, Exhibit P. 1. dated 29th April, 1948 was sent by A.R. registered post to Miss Sledge in Borneo and an acknowledgment, Exhibit P. 2, of that Notice to Quit signed by Miss Sledge as being received on 25th May, 1948 has been received. This Notice to Quit expired on 30th June, 1948.

Rent was paid by the Defendant in the name of Miss Sledge up to February, 1948 but after that, though tendered, it was refused by the Plaintiffs.

The Plaintiffs claim that the Defendant is a trespasser and ask for an injunction to restrain her from continuing to live on the said premises and also claim damages for trespass. The Defendant denies that she is a trespasser and claims that she has remained